FILED
U.S. Bankruptcy Appellate Panel of the Tenth Circuit

February 11, 2000

Barbara A. Schermerhorn Clerk

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE TENTH CIRCUIT

IN RE KOPEXA REALTY VENTURE CO., a Kansas General Partnership, Debtor.	BAP No. KS-99-029
DONALD H. KOPP, Appellant, v. EARL E. "SKIP" KOPP; CARL R. CLARK, Trustee for Kopexa Realty Venture Company; KOPP FAMILY TRUST; CAROLYN K. KOPP; ALL AMERICAN LIFE INSURANCE COMPANY; DARCY WILLIAMSON, Trustee for C.K. Williams, Inc.; THE UNITED STATES LIFE INSURANCE COMPANY IN THE CITY OF NEW YORK; and WILLIAM SHANTZ, U.S. Trustee, Appellees.	Bankr. No. 95-21261 Chapter 7 ORDER AND JUDGMENT*

Appeal from the United States Bankruptcy Court
for the District of Kansas

Before McFEELEY, Chief Judge, BOULDEN, and CORNISH, Bankruptcy Judges.

BOULDEN, Bankruptcy Judge.

* This order and judgment has no precedential value and may not be cited, except for the purposes of establishing the doctrines of law of the case, res judicata, or collateral estoppel. 10th Cir. BAP L.R. 8010-2.

Over a year after the United States Bankruptcy Court for the District of Kansas entered an order authorizing the sale of substantially all of the debtor's real and personal property (Sale Order), Don A. Kopp (Kopp), a creditor of the debtor, moved for clarification of the bankruptcy court's Sale Order. He asserted that the Sale Order had not terminated three subleases and, therefore, rents due under the subleases were property of the estate. The bankruptcy court issued a Judgment and Memorandum Opinion (Sale Judgment) in which it concluded that the issue was moot, and that the subleases were terminated. Kopp moved for reconsideration of the Sale Judgment, and the bankruptcy court denied his motion (Reconsideration Order). Kopp appeals the bankruptcy court's Sale Judgment and Reconsideration Order. For the reasons set forth below, we AFFIRM the bankruptcy court.

I. Background

A. The Subleases

Kopexa Realty Venture Company (Debtor) owned a shopping center that it leased to C.K. Williams, Inc. (CK) pursuant to a lease agreement (Prime Lease). CK then subleased properties within the shopping center to three subtenants (Subleases): Hot Stuff Fireplace & Patio (Hot Stuff), C&W Interiors, Inc. (C&W), and AAA Security Systems (AAA) (collectively, Subtenants).

B. The Debtor's bankruptcy case

On June 23, 1995, the Debtor filed a petition seeking protection under Chapter 11 of the Bankruptcy Code.[1] The bankruptcy court allowed the Debtor

[1] The Debtor initially filed for Chapter 11 relief in May 1991, in Case No. 91-21018-11. A plan was confirmed in that case in 1992, and the Prime Lease was apparently entered into by the Debtor and CK post-confirmation. The Debtor's second Chapter 11 case, which is the subject of this appeal, was filed after the Debtor defaulted under the agreements provided for in its confirmed plan and United States Life Insurance Company in the City of New York attempted to enforce the agreements. Kopp's standing in this case derives from his status as a creditor, as he purports to hold a claim against the Debtor in the

(continued...)

until the confirmation of a plan to assume the Prime Lease. Over eight months later, in March 1996, and prior to the confirmation of a plan, the bankruptcy court appointed a Chapter 11 trustee (Kopexa Trustee). No plan was ever confirmed in this Chapter 11 case.[2] The Prime Lease was never assumed or rejected pursuant to 11 U.S.C. § 365,[3] either by the Debtor as debtor in possession, or by the Kopexa Trustee. Since the Debtor was the lessor under the nonresidential, real property Prime Lease, it was not subject to the "deemed" rejection provisions set forth in § 365(d)(4).

C. CK's bankruptcy case

On June 23, 1995, the same day that the Debtor filed Chapter 11, CK also filed a petition seeking protection under Chapter 11. The bankruptcy court granted CK's motion as lessee under the Prime Lease to extend the time to assume or reject the Prime Lease until the confirmation of a plan of reorganization. In May 1996, CK's Chapter 11 case was converted by the bankruptcy court to Chapter 7, and shortly thereafter, the trustee in that case (CK Trustee) moved to extend the time to assume or reject the Prime Lease for 30 days. No action was ever taken on the motion and, therefore, the Prime Lease was deemed rejected by CK under § 365(d)(4) as early as 60 days after the conversion of CK's case to Chapter 7. As found by the bankruptcy court, the Subleases were never assumed or rejected by CK as a debtor in possession or by the CK Trustee, and, being nonresidential real property leases in which CK was the lessor, they were not subject to the "deemed" rejection provisions of

---

[1] (...continued)
amount of approximately $300,000 under the terms of the confirmed plan in the Debtor's initial Chapter 11 case. This claim is disputed by the Kopexa Trustee.

[2] In April 1998, the Debtor's case was converted to a case under Chapter 7. The Kopexa Trustee remained as trustee of the Chapter 7 estate.

[3] Unless otherwise noted, all future references are to title 11 of the United States Code.

§ 365(d)(4).

D. The Sale Order and related events

In May 1996, the Kopexa Trustee moved for bankruptcy court approval of a sale of substantially all of the Debtor's assets to United States Life Insurance Company in the City of New York (US Life), a secured creditor of the Debtor (Sale Motion). The Sale Motion listed the Prime Lease as a "disputed lease," and stated that pursuant to § 363(f), the proposed sale would be free and clear of all encumbrances, including disputed leases. The CK Trustee initially objected to the proposed sale, but later withdrew her objection. The Subtenants, although not formally notified of the Sale Motion, also objected to the sale in written correspondence filed with the court pro se, stating that as tenants of the shopping center the sale would not be in their best interests. In August 1996, the bankruptcy court entered the Sale Order, granting the Sale Motion, and expressly approving the sale of the Debtor's shopping center property to US Life free and clear of disputed leases, including the Prime Lease. No party in interest obtained a stay of the Sale Order, and the property was sold to US Life.

Earl and Carolyn Kopp, general partners and insiders of the Debtor, appealed the Sale Order. This Court dismissed the appeal as moot under § 363(m), stating:

> Appellants' have failed to request a remedy that would not affect the validity of the sale. They seek modification of the [Sale] Order to make it subject to, rather than free and clear of, the leases controlled by the Appellants. USLIFE's offer, as set forth in the Application, was contingent upon obtaining good faith purchaser status and upon the estate passing title free and clear of all interests claimed or controlled by the Appellants. Invalidating either of these contingencies is directly contrary to USLIFE's offer to purchase and would invalidate the sale.[6]
>
> . . . .
>
> [6] Appellants' attempt to interpret 11 U.S.C. § 363(m) to say that the Court may materially modify the Order without affecting the validity of the sale is disingenuous for the same reasons. Modifying the Order to make the sale subject to leasehold interests would affect the validity of the sale and thus violate 11 U.S.C. § 363(m).

In re Kopexa Realty Venture Co., BAP No. KS-96-45, slip op. at 7 (10th Cir. BAP filed Feb. 28, 1997) (*Kopexa I*).

Sometime after the sale, two of the Subtenants, Hot Stuff and C&W, entered into new leases with US Life, the new owner of the shopping center. C&W and Hot Stuff also entered into indemnity agreements with US Life, under which US Life agreed to indemnify them for back rent, maintenance, tax or insurance claims made by the Kopexa Trustee for the pre-US Life-sale period, and for the same types of claims made by the Kopps after the US Life sale. Furthermore, US Life agreed to indemnify Hot Stuff and C&W for any claims for damages made by the Kopps arising out of the execution of their leases with US Life. AAA, the third Subtenant, vacated its lease about six months after the sale, just after US Life took possession of the property.

E. The CK Settlement

In November 1996, while the Kopps' appeal of the unstayed Sale Order was pending, the bankruptcy court approved a settlement agreement (CK Settlement) between the Kopexa Trustee and the CK Trustee. The CK Settlement settled two actions that had been commenced by the Kopexa Trustee against CK: (1) an action under which the Kopexa Trustee sought to avoid the Prime Lease as a collusive insider transaction, and (2) a motion compelling the CK Trustee to assume or reject leases in which the Kopexa Trustee alleged that the Debtor had a claim against CK for arrearages.[4] Under the CK Settlement, the CK Trustee sold

[4] Earl and Carolyn Kopp appealed the bankruptcy court's order approving the CK Settlement. This Court reversed and remanded the case to the bankruptcy court to allow it to make findings of fact. *In re Kopexa Realty Venture Co.*, 213 B.R. 1020 (10th Cir. BAP 1997). After the Court's Opinion was issued, the Kopexa Trustee moved the bankruptcy court for additional findings of fact. On March 5, 1999, the bankruptcy court entered a Judgment on Decision regarding the Court's Settlement, Findings of Fact and Conclusions of Law regarding the Kopexa Trustee's Motion for Additional Findings of Fact and Conclusions of Law on October 1996 Motion to Compromise, and a Notice of Entry of Judgment.

all of CK's assets to the Debtor's estate. The Subleases were expressly listed in the CK Settlement as assets that were transferred by CK to the Debtor's estate.

F. Proceedings initiated by Kopp related to this appeal

In November 1997, over one year after the bankruptcy court's entry of the Sale Order and approximately nine months after this Court entered its Order and Judgment in *Kopexa I*, Kopp filed a Motion to Clarify Order and Determine Asset Status (Motion to Clarify) in the bankruptcy court. In this Motion, Kopp requested that the bankruptcy court clarify its Sale Order to reflect that the Prime Lease and the Subleases were excluded from the sale to US Life. He maintained that this fact was evidenced by the CK Settlement and a related bill of sale, under which the CK Trustee sold the Subleases to the Debtor's estate. Since the Subleases belonged to the Debtor's estate, Kopp claimed that the rents due under the Subleases should be collected for the benefit of the Debtor's creditors, including himself.

The bankruptcy court entered its Sale Judgment, concluding that Kopp's Motion to Clarify was moot, or that the Subleases had been terminated when the underlying real property was sold to US Life. Kopp moved for reconsideration, and that motion was denied by the bankruptcy court in its Reconsideration Order. Kopp then timely filed this appeal from the final Sale Judgment and Reconsideration Order, and the parties have consented to this Court's jurisdiction. *See* 28 U.S.C. §§ 158(a)(1) & (c)(1); Fed. R. Bankr. P. 8001(a) & 8002(a); 10th Cir. BAP L.R. 8001-1.

II. Discussion

The bankruptcy court held:

> [T]he sale terminated the subleases. [The Kopexa Trustee's] § 363 sale motion sought to sell "assets free and clear of liens and encumbrances." The Kopexa prime lease to C.K. Williams was among those encumbrances listed in [the Kopexa Trustee's] motion. Although [the Kopexa Trustee] justified selling the property clear of the leases using § 363(f)4) [sic], which requires an interest be disputed to justify its sale, in

> the case of the C.K. William's lease, § 363(f)(2) also applied. This subsection permits a sale free and clear of an interest when its holder consents. When C.K. Williams estate representative, [the CK Trustee], withdrew her objection to the sale, C.K. Williams, in effect, consented to the sale. The effect of the sale was to cancel the C.K. Williams prime lease and transfer the Kopexa property to [US Life] free and clear of that encumbrance.
>
> But did the subleases survive the sale? Under state law, the termination of a prime lease terminates a sublease:
>
> > The termination of the primary lease operates as a termination of the sublease, and this is true whether the termination is brought about by a forfeiture, or by cancellation . . . .
> >
> > The right of the sublessee to the possession of the premises, as against the original lessor, terminates with the lease or term of the original lease.

Sale Judgment, pp. 8-9. The bankruptcy court's analysis is correct.

The Sale Order is clear that the shopping center was sold to US Life free and clear of disputed leases, including the Prime Lease, pursuant to § 363(f)(4). This sale operated to terminate or extinguish the Prime Lease. *See, e.g., In re Taylor*, 198 B.R.142 (Bankr. D.S.C. 1996).[5] The termination of the Prime Lease, in turn, had the effect of terminating the Subleases under state law. *See, e.g.*, 51C C.J.S. *Landlord & Tenant* § 48(1), at 142 (1968); 1 *American Law of Property* § 3.62 (1952); *see also V.O.B Co. v. Hang It Up., Inc.* 691 P.2d 1157 (Colo. App. 1984) (termination of prime lease terminates sublease); *accord International Indus., Inc. v. United Mortgage Co.*, 606 P.2d 163 (Nev. 1980); *Barby v. Unger*, 658 P.2d, 512 (Or. App. 1983); *Bennion v. Comstock Inv. Corp.*, 566 P.2d 1289 (Wash. App. 1977). The Sale Order is final and, as found by this Court in *Kopexa I*, it is not subject to collateral attack.

---

[5] In *Taylor*, 198 B.R. at 142, the court refused to approve a sale that attempted to cleanse the estate of unwanted leases through a § 363(f) sale, concluding that the only remedies available to a debtor involved in unexpired leases was under § 365. Although there may be merit to this argument, which was raised below, Appellant's Appendix, Pretrial Order, Tab 7, p. 12, the issue is not before this Court. The proper time for this argument to have been raised and considered was prior to the entry of the Sale Order. At this point, the Sale Order is final and is not subject to collateral attack.

That this appeal is merely a collateral attack of the final Sale Order is evident from Kopp's pleadings. He is essentially arguing that the Sale Order must be "clarified," *i.e.*, modified to exempt the Subleases from being affected thereby, because the Subtenants were not given formal notice of the Sale Motion. Although couched as a motion to "clarify" the Sale Order, it is very clear that Kopp is dissatisfied with the Sale Order and is attempting to impermissibly modify it in the name of clarification. As stated in *Kopexa I*, Kopp has "failed to request a remedy that would not affect the validity of the sale. [He] seek[s] modification of the [Sale] Order to make it subject to, rather than free and clear of, the leases . . . ." *Kopexa I*, slip op. at 7. Such a modification is simply not permissible at this stage in the proceedings. *See* 11 U.S.C. § 363(m); *Kopexa I.*

Kopp maintains that the fact that the Subtenants did not receive formal notice of the Sale Motion taints the Sale Order under Kansas law, which requires that tenants be notified of a lease termination in foreclosure, and deprived the Subtenants of due process. These arguments are without merit for several reasons.

First, the procedural requirements of Kansas foreclosure law are not applicable to a sale in bankruptcy pursuant to § 363(b) and (f). Second, as discussed above, this argument, which essentially seeks to invalidate the final Sale Order, is an impermissible collateral attack on that Order. *See* 11 U.S.C. § 363(m); *Kopexa I*. Finally, even assuming that Kopp has standing to raise a due process argument on behalf of the Subtenants, there is no due process concern here as the Subtenants had actual notice of the sale proceedings and, therefore, were afforded "an opportunity to present their objections." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). As the bankruptcy court recognized, the Subtenants participated in the sale proceedings by filing formal written objections to the sale, which were considered by the

bankruptcy court in granting the Sale Order. *Cf. In re Blagg*, 223 B.R. 795, 807 (10th Cir. BAP 1998) (due process requires the opportunity to respond, but it does not require an oral or evidentiary hearing–the opportunity to brief an issue is sufficient to satisfy due process requirements), *appeal dismissed*, 198 F.3d 257, 1999 WL 909885 (10th Cir. filed Oct. 19, 1999) (unreported decision). The fact that these objections were filed by the Subtenants *pro se* does not change this result.

Kopp has also appealed the Reconsideration Order, in which the bankruptcy court refused to reconsider the Sale Judgment. The bankruptcy court did not abuse its discretion in refusing to reconsider its Sale Judgment. *See, e.g.*, *Stubblefield v. Windsor Capital Group*, 74 F.3d 990, 994 (10th Cir. 1996) (Rule 60(b) orders are reviewed under abuse of discretion standard). Kopp's Motion for Reconsideration asserts no grounds for reconsideration under Fed. R. Civ. P. 60(b), which is made applicable in bankruptcy matters under Fed. R. Bank. P. 9024. Kopp merely disagreed with the conclusion reached by the bankruptcy court. This is not grounds for reconsideration.

III. Conclusion

For the reasons set forth above, the bankruptcy court's Sale Judgment and Reconsideration Order are AFFIRMED.